

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

**FILED BY CLERK**  
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COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

IN RE RICARDO F.-C. )  
 ) 2 CA-JV 2009-0090  
 ) DEPARTMENT A  
 )  
 ) MEMORANDUM DECISION  
 ) Not for Publication  
 ) Rule 28, Rules of Civil  
 ) Appellate Procedure

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 15290803

Honorable Gus Aragón, Judge

AFFIRMED

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Barbara LaWall, Pima County Attorney  
By Kara Crosby

Tucson  
Attorneys for State

Robert J. Hirsh, Pima County Public Defender  
By Susan C. L. Kelly

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E S P I N O S A, Presiding Judge.

¶1 Fifteen-year-old Ricardo F.-C. appeals from the juvenile court's order committing him to the Arizona Department of Juvenile Corrections (ADJC) for a minimum

term of six months.<sup>1</sup> Specifically, he argues the court abused its discretion and violated the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12132, in failing to impose a less restrictive, alternative disposition. For the following reasons, we affirm.

¶2 The juvenile court adjudicated Ricardo delinquent after he admitted charges in two delinquency petitions: possession of a firearm on February 6 and March 28, 2009, and possession of marijuana on the latter date. All three offenses were class six felonies. Under the terms of a plea agreement, the court dismissed other charges against Ricardo, including a third delinquency petition that alleged Ricardo had again been found in possession of a firearm in June 2009, while awaiting adjudication on the earlier charges. Ricardo was released pending his disposition on the condition that he submit to electronic monitoring. At the request of Ronald Islas, the Pima County Juvenile Probation Officer assigned to Ricardo's case, the court ordered Ricardo to participate in a psychological evaluation before the disposition hearing.

¶3 After reviewing the psychologist's report and Islas's recommendation that Ricardo be committed to ADJC, Ricardo's counsel requested a continuance to investigate alternative placements. According to counsel, the psychologist had reported she would have recommended placement in a Level III residential facility "but for the fact that [Ricardo] has neurological issues." Islas stated it was unusual to recommend ADJC placement after a minor's first adjudication of delinquency. He also acknowledged that Ricardo had not

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<sup>1</sup>Ricardo does not challenge his adjudication of delinquency.

received any rehabilitative services from the court, and that Ricardo appeared to have “done very well” in complying with his conditions of release. But he noted the seriousness of the firearm offenses Ricardo had committed on separate occasions during the months before his adjudication. According to Islas, the probation department’s placement committee had considered the availability of alternative placements but had determined “nobody is willing to offer [Ricardo] services based on his risk level and his needs.” Islas confirmed that Ricardo suffered from a neurological disorder that caused him to have seizures and that this condition was “at least one reason” Ricardo would not have been eligible for placement at Sycamore Canyon, the Level III placement facility providing contract services for the court.<sup>2</sup>

¶4 The juvenile court granted Ricardo’s request for a continuance but also found he “present[ed] a serious danger to the community” and ordered him detained pending disposition. Before the continued hearing, Ricardo filed motions for the appointment of a guardian ad litem and for an order directing “Probation Referrals to Level Three Facilities.” Ricardo also filed a motion for an additional continuance. In it, he asserted the evaluating psychologist had filed an addendum to her report and had amended her placement recommendation after Islas had prepared his original disposition report. According to

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<sup>2</sup>In a motion Ricardo filed before the continued disposition hearing, he stated the evaluating psychologist would have “recommend[ed] a behavioral residential treatment level III facility, but for *two* reasons”: Ricardo’s seizure disorder *and* his home environment after release. (Emphasis added.) According to another of his motions, the psychologist opined he “would benefit from a behavioral treatment program, but that benefit would be lost shortly after his return to his environment.”

Ricardo, the doctor originally had recommended Ricardo's commitment to ADJC but had amended her recommendation to include placement in a high-impact, Level III facility if Ricardo was not found ineligible for such placement because of his medical condition.

¶5 After argument at the disposition hearing, the juvenile court denied Ricardo's motions. With respect to disposition, the state supported the probation department's recommendation that Ricardo be committed to ADJC, arguing the commitment was warranted by the seriousness of his offenses and the risk he posed to the community. Ricardo argued ADJC commitment was inappropriate because this was his first delinquency adjudication, his offenses were not serious felonies, he had done well during his five weeks on release pending disposition, and the court had not provided him with opportunities for rehabilitation in less restrictive settings. He also argued committing him to ADJC would "violate[] the spirit of the ADA, which says that disabilities shouldn't keep you from services others without that disability would have."

¶6 In announcing its disposition, the juvenile court stated it had considered the recommendations of the parties and the probation department, as well as Ricardo's history of referrals, including "the fact that [Ricardo had been] . . . arrested for possession of yet a third weapon" while adjudications for his previous two offenses were still pending and the fact that all of the charged offenses had been "committed within a short space of time." The court said it had also considered the nature of the offenses, Ricardo's needs, mitigating circumstances, and the needs of and risks to the community. The court concluded "the

protection of the community require[d Ricardo's] placement in a secure facility and the commitment . . . [was] necessary . . . to ensure accountability for [his] acts.” Finally, the court found there were no appropriate, less restrictive alternatives in the community and that commitment to ADJC presented “a final opportunity for [Ricardo] to explore rehabilitation.”

¶7 On appeal, Ricardo challenges the juvenile court's disposition order as an abuse of discretion, a misapplication of our supreme court's guidelines for the commitment of juveniles to ADJC, and a violation of the ADA. “A . . . court has broad discretion in determining the proper disposition of a delinquent juvenile,” and we will not overturn a disposition order absent a court's abuse of that discretion. *In re Themika M.*, 206 Ariz. 553, ¶ 5, 81 P.3d 344, 345 (App. 2003). In the analogous context of adult sentencing, a court abuses its discretion if it acts arbitrarily or capriciously or fails to conduct an adequate investigation of relevant facts. *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). In a delinquency case, a court may also abuse its discretion by failing to consider the advisory guidelines established by our supreme court for the commitment of minors to ADJC. *In re Melissa K.*, 197 Ariz. 491, ¶¶ 14-16, 4 P.3d 1034, 1038 (App. 2000); *see* A.R.S. § 8-246(C) (requiring promulgation of commitment guidelines); *see also* Ariz. Code of Jud. Admin. § 6-304(C) (“Commitment Guidelines”). We agree with the state that the court did not abuse its broad discretion here, and we find no reason to disturb Ricardo's disposition.

¶8 In determining the appropriate disposition for a delinquent juvenile, a juvenile court must consider “the nature of the offense,” the “risk the juvenile poses to the

community,” and “whether appropriate less restrictive alternatives to commitment exist within the community.” Ariz. Code of Jud. Admin. § 6-304(C)(1)(c). The guidelines do not, however, “mandate that the less restrictive alternative be ordered.” *In re Niky R.*, 203 Ariz. 387, ¶ 19, 55 P.3d 81, 85 (App. 2002). Rather, the court must consider less restrictive alternatives in light of the other factors identified in the commitment guidelines—the risk the juvenile poses to the community and the nature of the offense. *Id.* Thus, the guidelines provide for a “particularized consideration of juveniles on an individual basis.” *Id.*, quoting *In re Maricopa County Juv. Action No. J-90110*, 127 Ariz. 389, 392, 621 P.2d 298, 301 (App. 1980).

¶9 Ricardo argues commitment to ADJC was inappropriate because, in contrast to *Niky R.*, the state had failed to “demonstrate[] through the use of other alternatives . . . [that he could not] be controlled in a less secure setting.”<sup>3</sup> *Id.* ¶ 16, quoting A.R.S. § 41-2816(A) (alterations added). Quoting A.R.S. § 41-2816, the court in *Niky R.* explained,

The legislative mandate for the juvenile department of corrections . . . provides that secure facilities are for the “custody, treatment, rehabilitation and education of youth who pose a threat to public safety, who have engaged in a pattern of conduct characterized by persistent and delinquent offenses that, as demonstrated through the use of other alternatives, cannot be controlled in a less secure setting, or who have had their conditional liberty revoked[.]”

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<sup>3</sup>In *Niky R.*, the minor had committed additional offenses after previously being placed on juvenile intensive probation supervision. *Niky R.*, 203 Ariz. 387, ¶ 4, 55 P.3d at 83.

*Niky R.*, 203 Ariz. 387, ¶ 16, 55 P.3d at 85. But in making this argument, Ricardo fails to appreciate that § 41-2816 is written in the disjunctive, and a court may therefore find commitment to ADJC is warranted by a juvenile’s threat to public safety alone, even if there have been no previous attempts to rehabilitate him. *See Niky R.*, 203 Ariz. 387, ¶ 11, 55 P.3d at 85 (“Under the statute, such a threat [to public safety] (*or other compliance with § 41-2816*) is required.” (Emphasis added)). The legislature did not intend for the courts to apply the commitment guidelines “in a mechanical fashion,” *see id.* ¶ 13, and it is not this court’s role to prescribe how those factors weigh in the balance of a court’s discretion. *Cf. In re James P.*, 214 Ariz. 420, ¶ 24, 153 P.3d 1049, 1054 (App. 2007) (reviewing court “will not reweigh the evidence or consider the credibility of witnesses” to determine sufficiency of evidence).

¶10 In this case, the juvenile court’s statements clearly reflected its consideration of the commitment guidelines, and on this record, we find no abuse of discretion. Although Ricardo argues “the plain language of the psychological evaluation recommend[ed] treatment at a Level III facility,” the court was not bound to follow the psychologist’s recommendation. *Cf. In re Coconino County Juv. Action No. J-9896*, 154 Ariz. 240, 243, 741 P.2d 1218, 1221 (1987) (court not bound to follow psychologists’ recommendations that juvenile not be transferred to adult court).

¶11 Moreover, we are unable to confirm Ricardo’s claims about the evidence before the juvenile court because neither the psychologist’s evaluation nor the disposition

report Islas prepared are part of the record before us. *See* Ariz. R. P. Juv. Ct. 104(D) (presumptive record on appeal), (E) (procedure for designation of additional materials for inclusion in record). From the disposition transcripts, it appears the court found both reports contained evidence that Ricardo posed a substantial threat to the community. For example, the court noted that, in four months' time, Ricardo had been charged with three weapons offenses—for “[t]wo .45 caliber handguns and an A-K 47 automatic weapon.” “We generally presume items that are necessary for our consideration of the issues but not included in the record support the court’s findings and conclusions.” *Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶ 21, 158 P.3d 225, 231 (App. 2007). We apply that presumption here.

¶12 For the same reason, the record does not support a conclusion that Ricardo was a qualified individual with a disability or that the juvenile court discriminated against him or excluded him from services because of his disability, as required to maintain a claim under the ADA. *See* 42 U.S.C.A. § 12132. We also agree with the California Court of Appeals that Congress intended such claims to be raised “by means of a complaint in an independent civil action,” not “in the context of a direct appeal from a [juvenile court’s] dispositional order.” *In re M.S.*, 95 Cal. Rptr. 3d 273, 283-84 (App. 2009). As here, the juvenile in that case was “attempting to assert an ADA violation as grounds to set aside an otherwise valid dispositional order.” The court reasoned,

[A]chieving the important rehabilitative and treatment goals of the juvenile proceedings would be severely hampered if,

whenever the court considers, as it must, a minor's physical or psychological problems in assessing whether a particular placement would be effective, its decision could trigger an ADA claim that the court would have to allow the parties to litigate before reaching a final disposition. The obvious delays and procedural and substantive problems that would follow from importing what is, in effect, a new and complex civil action into the juvenile proceedings, is not mandated by the ADA, which instead provides a remedy by way of an independent civil action.

*Id.* at 282.

¶13 Contrary to Ricardo's assertions, we conclude the juvenile court's decision to commit Ricardo to ADJC was consistent with ADJC commitment guidelines and was not an abuse of its discretion. We therefore affirm the juvenile court's adjudication of delinquency and disposition order.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge